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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1884.**

No. ~~315~~. 50

ALEXANDER R. SHEPHERD, PLAINTIFF IN ERROR,

*vs.*

JOHN FREDERICK MAY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

**FILED OCTOBER 7, 1882.**

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Declaration. Filed May 28th, 1879.*

In the Supreme Court of the District of Columbia, the 28th day of May, A. D. 1879.

JOHN FREDERICK MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820.

The plaintiff sues the defendant for money payable by the defendant to the plaintiff, for that the defendant, at Washington, in said District (by name of Alexander R. Shepherd), on the 26th day of April, A. D. 1875, by his promissory note now overdue, promised to pay to the order of the plaintiff (by name of John F. May) the sum of $10,000 two years after date, with interest at the rate of ten per centum per annum until paid, payable quarter-yearly at the National Metropolitan Bank, Washington, D. C., for value received, and the said note was duly presented for payment and was dishonored; but the said defendant did not pay the same, except the sum of eight thousand one hundred and thirty-two $\frac{1}{100}$ dollars,
2 paid and credited thereon February 19th, 1879, and the interest thereon up to the 26th day of April, 1878.

And the plaintiff sues the defendant for other money payable by the defendant to the plaintiff, for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims two thousand six hundred and eighty-four $\frac{56}{100}$ dollars, with interest thereon at the rate of ten per cent. per annum until paid, from the 19th day of February, 1879, according to the particular of demand herewith filed, besides costs.

ANDREW B. DUVALL,
*Att'y for Plaintiff.*

NOTE.—The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof, otherwise judgment.

A. B. DUVALL,
*Att'y for Pl'ff.*

3 *Particulars of Demand.*

$10,000.00. WASHINGTON, D. C., *April 26th*, 1875.

Two years after date, I promise to pay to the order of John F. May ten thousand dollars, with interest at ten per centum per annum, payable quarter-yearly until paid, at the National Metropolitan Bank, Washington, D. C., for value received.

ALEX. R. SHEPHERD.

July 26th, '75. 250 p'd July 26th, 1875.
Oct. " " 250 p'd Oct. 26th, 1875.
Jan'y " '76. 250 p'd Jan'y 26, 1876.
April " " 250 p'd Ap'l 26th, 1876.
July " " 250 p'd July 26th, 1876.
Oct. " " 250 p'd Oct. 26th, 1876.
Jan'y " '77. 250 p'd Jan'y 25th, 1877.
1877.
Ap'l 26th. Int. to 26th Ap'l, '77, $250, paid.
July 25th. " 26th July, '77, $250, paid.
Oct. 23rd. " 26th Oct., '77, $250, paid.
1878.
Feb'y 9th. " 26th Jan'y, '78, $250, paid.
Ap'l 23rd. " 26th Ap'l, '78, $250, paid.

Feb'y 19th, 1879. By net proceeds of sale sub-lot 17, square 103, under deed of trust, eight thousand one hundred and thirty-two $\frac{10}{100}$ dollars, $8,132.10.

RICHARD WALLACH,
A. B. DUVALL,
*Trustees.*

4 NEW YORK STATE, }
*New York City & County,* } *ss:*

Personally appears John Frederick May, who, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing declaration, and the holder of the promissory note therein declared on; that the plaintiff became such holder *bona fide*, for value, in the usual course of business. The defendant, on the day of the date thereof, executed and delivered the same to plaintiff for the sum of $10,000.00 then loaned and advanced by plaintiff to defendant at his request.

That the genuine signature of the defendant appears on said note; that at the maturity thereof the said note was duly presented for payment at the National Metropolitan Bank, Washington, D. C., and was dishonored.

That no portion of the principal sum or the interest due upon the said note have been paid or satisfied in any manner whatsoever, except as in the declaration stated, but the whole of such prin-
5 cipal sum and interest, except as stated in the declaration, is now overdue and unpaid; that the cause of action of the plaintiff in the said declaration is grounded upon the said note, and that for such cause of action the plaintiff claims to be due, and affiant firmly believes that he has a just right to recover against the defendant, exclusive of all set offs and just grounds of defense, what he claims in his declaration, and that said sum is justly payable by the defendant to the plaintiff, to wit, the sum of $2,684.56, the balance of said note, with interest on the same, at ten per cent. per annum, until paid, from the 19th day of February, 1879, besides costs of suit.

JNO. FRED'K MAY.

Sworn to and subscribed before me, this 27th day of May, 1879.
[SEAL.] THOS. F. PENNY,
*Notary Public, N. Y. Co.*

STATE OF NEW YORK,
*City and County of New York,* } ss:

I, Hubert O. Thompson, clerk of the city and county of
6 New York, and also clerk of the supreme court of the said city and county, being a court of record, do hereby certify that Thos. F. Penny, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 27th day of May, 1879.
[SEAL.] HUBERT O. THOMPSON, *Clerk.*

*Summons. Issued May 28th,* 1879.

In the Supreme Court of the District of Columbia.

JOHN FREDERICK MAY, Pl'ff,
*vs.*
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 20820.

7 The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.
[SEAL.] R. J. MEIGS, *Clerk.*
By J. R. YOUNG, *Ass't Cl'k.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

On back: Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 2nd day of June, 1879.
F. DOUGLAS, *Marshal.*

*Pleas. Filed July 2nd,* 1879.

In the Supreme Court of the District of Columbia.

8 JOHN F. MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820.

1. The defendant says that he never was indebted as alleged.
2. And for a further plea the defendant says that he never promised as alleged.

3. And for a further plea the defendant says that the plaintiff ought not to be admitted to say that defendant did not pay said note, except the sum of $8,132.10 and interest on said note to April 26th, 1878, because he says that said plaintiff required and received from defendant, with said note as security therefor, a deed of trust of certain valuable real estate, and assented and agreed to the terms and conditions of said deed, by which power is given to the trustee to sell said real estate upon default made in the payment of said note, and in connection therewith it is required that upon sale made the purchase-money shall amount in cash to the amount of the indebtedness secured by said deed of trust unpaid with the expenses
9 of sale; that the plaintiff required sale to be made of said real estate under the powers, terms, and conditions of said deed of trust by said trustees, and at a sale so made became the purchaser of said real estate, and said plaintiff received a deed therefor and entered into possession thereof.

Wherefore defendant prays judgment whether the plaintiff ought to be admitted against his own acknowledgement, in assenting and agreeing to the terms and conditions of said deed of trust by purchasing said real estate at a sale made according to the terms and conditions of said deed of trust, and taking a deed therefor, to say that the said promissory note is not paid.

A. C. BRADLEY,
*Att'y for Defendant.*

Supreme Court, District of Columbia.

JOHN F. MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820.

DISTRICT OF COLUMBIA, *ss:*

Alexander R. Shepherd, being duly sworn, deposes and
10 says: That the plaintiff, John F. May, advanced the money represented by said note upon the faith of the security of lot 17, square 103, in the city of Washington, D. C., after fully satisfying himself as to the value of the said property and the sufficiency of the said security, and that he took from deponent a deed of trust of said land, by which the trustees are authorized to sell upon default made only for the amount of the dept unpaid, and expenses of sale in cash and the balance on time, as prescribed by said deed of trust; that said May purchased at sale made under said trust, and advertised upon said terms, when the property was worth, at a low estimate, the sum of $12,000, and took a deed therefor from the trustees, and deponent is advised that the said note is satisfied by said sale and conveyance.

ALEXANDER R. SHEPHERD.

Subscribed and sworn to before me, this 28th day of June, 1879.
[SEAL.] J. M. YOUNG,
*Notary Public.*

11 *Replication & Note of Issue. Filed July 23d, 1879.*

In the Supreme Court of the District of Columbia.

JOHN F. MAY
*vs.*
ALEX. R SHEPHERD. } At Law. No. 20820.

Plaintiff joins issue upon defendant's pleas.

BRADLEY & DUVALL,
*Att'ys for Plaintiff.*

Supreme Court, District of Columbia.

MAY
*vs.*
SHEPHERD. } At Law. No. 20820.

Bradley and Duvall for plaintiff, A. C. Bradley for defendant.
Last pleading filed July 18th, 1879. Please calendar this case.

BRADLEY & DUVALL.

*Additional Pleas. Filed December 1st, 1880.*

In the Supreme Court of the District of Columbia.

12 JOHN F. MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820.

The defendant, by leave of the court first had and obtained, filed as additional pleas:

The defendant for a further plea says that the payment of the said note was secured to the plaintiff by a deed of trust of even date therewith, whereby certain very valuable real estate was conveyed by this defendant and his wife to one Richard Wallach and one Andrew B. Duvall, as trustees, with power to sell said real estate upon default made in the payment of said note, as will fully appear by said deed in court to be produced, and the plaintiff caused said property to be advertised and sold in accordance with the terms and provisions of said deed of trust, and purchased the said property at said sale and received a deed thereof, and the said property exceeded in value the amount of the said note with interest, costs of sale and taxes; wherefore the defendant says that the said note is paid and satisfied.

13 And for a further plea the defendant says that the plaintiff ought not to be admitted to say that the said note is not paid, as in his declaration he has alleged, because he says that the said note was secured to be paid to the plaintiff by a certain deed of trust bearing even date therewith, and in court to be produced, whereby the defendant conveyed to one Richard Wallach and one Andrew B. Duvall, as trustees, certain valuable real estate described in said deed of trust, with power to sell said real estate upon default made

in the payment of said note upon the terms prescribed by said deed, to wit:

The amount of indebtedness secured by said deed of trust unpaid and the expenses of sale in cash, and the balance at twelve and eighteen months, &c. And thereafter the said Wallach and Duvall, trustees, by their deed, bearing date February 19th, 1879, and in court to be produced, conveyed the said real estate to the plaintiff; and in said deed it is recited that this defendant and his wife made and executed the said deed of trust (and as to the trusts and
14 powers contained in said deed of trust, reference is made in said deed to the record liber and folio of said deed of trust), and that the said trustees, in execution of the trusts described in said deed of trust, and by direction of the party secured thereby (meaning the plaintiff), proceeded to make sale of said real estate by public advertisement thereof, and at the time and place advertised for the sale thereof did sell the same, at which said sale the plaintiff became the purchaser, and that the plaintiff had fully complied with the terms of said sale, wherefore the defendant prays judgment, if the plaintiff ought to be admitted, against his own acknowledgments and deeds, to say that the said note is not paid, as in declaring he has alleged.

A. C. BRADLEY,
*Att'y for Defendant.*

Plaintiff hereby joins issue upon these pleas.

BRADLEY & DUVALL,
*Att'y- for Plaintiff.*

Proceedings before the supreme court of the District of Co-
15 lumbia, holding a special term at law, division No. 2, commencing on the 18th day, being the third Monday of October, 1880.

Present presiding, Alexander B. Hagner, associate justice of said supreme court.

WEDNESDAY, *December 1st*, 1880.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

JOHN F. MAY, Pl'ff,
*vs.*
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 20820.

Now comes here, as well the plaintiff, by his attorneys, Messrs. Bradley & Duvall, as the defendant, by his attorney, Mr. A. C. Bradley, and thereupon, on motion, leave is granted the defendant to file additional pleas, and the same are filed, to which the plaintiff joins issue, whereupon come a jury of good and lawful men of this District, to wit: Maurice Sioussa, Frederick A. Van Tagen, George Ferguson, William A. Barnes, Moses T. Parker, Adolph H. Eichstadt, John A. Reem, Joseph R. Washington, Robert H. Bontz,
16 Thomas A. Lazenby, Joseph Gawler, and William P. Ferguson, who, being duly sworn to try the issue above joined, after

hearing the evidence in the case, on their oath say they find said issue in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is three thousand one hundred and sixty-three dollars and twenty-eight cents, besides costs. Therefore it is considered that the plaintiff recover against the defendant three thousand one hundred and sixty-three dollars and twenty-eight cents as aforesaid, being the money payable by him to the plaintiff by reason of the premises, and $25.95 for his costs of suit, and have execution thereof.

*Motion for New Trial on Exceptions at Trial. Filed December 3rd*, 1880.

In the Supreme Court of the District of Columbia.

JOHN F. MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820.

17 And now comes the defendant, and moves the court to set aside the verdict, and for a new trial in this cause for errors of law in the rulings of the justice who tried the cause, to which exceptions were taken at the time of trial.

WM. F. MATTINGLY,
A. C. BRADLEY,
*Att'ys for Defendants.*

FRIDAY, *December* 31, 1880.

Session resumed pursuant to adjournment. Hagner, justice, presiding.

JOHN F. MAY, Pl'ff.
*vs.*
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 20820.

Upon hearing the defendant's motion for a new trial for errors of law, it is considered that said motion be, and the same is, hereby overruled. Appeal prayed by defendant.

*Bill of Exceptions. Filed January 21st*, 1881.

In the Supreme Court of the District of Columbia.

18 JOHN F. MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820.

First. At the trial of this cause the plaintiff to maintain the issues on his part joined was sworn as a witness, and having proven the signature hereof, offered in evidence the promissory note, in words and figures following, to wit:

$10,000.00. WASHINGTON, D. C., *April 26th*, 1875.

Two years after date I promise to pay to the order of John F. May ten thousand dollars, with interest at ten per centum per an-

num, payable quarter yearly until paid, at the National Metropolitan Bank, Washington, D. C., for value rec'd.

ALEX. R. SHEPHERD.

| | | | |
|---|---|---|---|
| July 26th, | '75. | 250 | p'd July 26th, 1875. |
| Oct. " | " | 250 | p'd Oct. 26th, 1875. |
| Jan'y " | '76. | 250 | p'd Jan'y 26th, 1876. |
| April " | " | 250 | p'd Ap'l 26th, 1876. |
| July " | " | 250 | p'd July 26th, 1876. |
| Oct. " | " | 250 | p'd Oct. 26th, 1876. |
| Jan'y " | '77. | 250 | p'd Jan'y 25th, 1877. |
| Ap'l 26th, | 1877. | | Int. to 26th Ap'l, '77, $250, paid. |
| 19 July 25th, | " | " | " 26th July, '77, $250, paid. |
| Oct. 23d, | " | " | " 26th Octo., '77, $250, paid. |
| Feb'y 9th, 1878. | " | " | " 26th Jan'y, '78, $250 paid. |
| April 23rd, " | " | " | " 26th Ap'l, '78, $250, paid. |

Feb'y 19th, 1879, by nett proceeds of sale sub lot 17, square 103, under deed of trust, eight thousand one hundred and thirty-two $\frac{10}{100}$ dollars, $8,132.10.

RICHARD WALLACH,
A. B. DUVALL, *Trustees.*

And the said note was admitted.

The plaintiff then testified that the said note was given to him by the defendant for money lent by him to the defendant, and was secured by a deed of trust of a house on "G" street, between 20th and 21st streets, in a row known as "Babcock Row," in the city of Washington, D. C. That the said house is twenty-seven feet six inches front, three stories and mansard roof main building, with a three-story back building, and contains seventeen rooms; and that the lot is one hundred and twenty feet deep. That he regarded the property as good security for a loan of $10,000.00. And the plain-
20 tiff produced the deed of trust given to secure the payment of said note, in words and figures following, to wit:

*Trust. Recorded April* 27, 1875.

ALEX. R. SHEPHERD *et ux.* to WALLACH & DUVALL.

This indenture made this twenty-sixth day of April, in the year of our Lord one thousand eight hundred and seventy-five, between Alexander R. Shepherd and Mary G. Shepherd, his wife, of the city of Washington, in the District of Columbia, of the first part, and Richard Wallach and Andrew B. Duvall, of the same place, of the second part, whereas the said Alexander R. Shepherd is justly indebted unto John F. May in the sum of ten thousand dollars, for which amount he hath passed unto said May his promissory note, bearing even date with these presents, payable two years after date, with interest at the rate of ten (10) per centum per annum until paid, payable quarter yearly at the National Metropolitan Bank, Washington, D. C. And whereas the said par-

ties of the first part desire to secure the punctual payment
21 of said note when and as the same shall become due and payable, with all interests and costs due and accruing thereon, and therefore execute these presents: Now, therefore, this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises, and the sum of one dollar, in lawful money of the United States to them in hand paid by the said parties of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto the said parties of the second part, the survivor of them, his heirs and assigns, the following described real estate, situate in the city of Washington, District of Columbia, to wit, lot numbered seventeen (17), in Babcock's subdivision of original lots numbered eight (8), nine (9), and ten (10), in square numbered one hundred and three (103), as said subdivision is duly recorded in the surveyor's office of said city, in liber H, D. C., together with all the
22 improvements, ways, easements, rights, privileges, appurtenances, and heraditaments to the same belonging or in any way appertaining, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part of, in, and to the said piece or parcel of land and premises: To have and to hold the said piece or parcel of land and premises with the appurtenances unto and to the use of the said parties of the second part, the survivor of them, his heirs and assigns, in and upon the trusts nevertheless hereinafter mentioned and declared, and none other, that is to say: In trust to permit the said Alexander R. Shepherd, his heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply to and for his and their sole use and benefit until default be made in the payment of said note, or any instalment of interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same, and upon the full payment of all of said note, and the interest
23 thereon, and all other proper costs, charges, commissions, half commissions, or expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Alexander R. Shepherd, his heirs or assigns, at his or their cost. And upon this further trust, that upon default being made in the payment of the said note, or any instalment of interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same, then and at any time thereafter to sell the said piece or parcel of land and premises at public auction, in front of the premises, after at least twenty days' notice of the time, place, and terms of sale by advertisement in some one or more of the newspapers printed and published in the said city of Washington, which said terms of sale shall be as follows, viz: The amount of indebtedness secured by said deed of trust unpaid, with the expenses of sale in cash, and the balance at twelve and
24 eighteen months, for which the notes of the purchaser, bear-

ing interest from the day of sale, and secured by a deed of trust on the property sold, shall be taken. A deposit of two hundred dollars shall be required of the purchaser at the time of sale, and all conveyancing and revenue stamps shall be at the expense of the purchaser. And upon the further trust, upon full compliance with the terms of sale to convey the property sold in fee simple to the purchaser or purchasers thereof at his, her, or their costs and expense, and without any liability, to see to the application of the purchase money, and out of the proceeds of said sale or sales, first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of three per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of said note, and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said Alexander R. Shepherd, his heirs, or assigns. And the said Alexander R. Shepherd doth hereby covenant with the said parties of the second part, the survivor of them, his heirs and assigns,
25 that all taxes upon the said land shall be duly paid, and that the building on said parcel of land shall be kept insured during the continuance of this trust in some good and responsible fire insurance company or companies, to the satisfaction of said parties of the second part, in the sum of ten thousand dollars, for the benefit of the debt hereinbefore described, and the policy or policies of insurance be assigned to the said parties of the second part, as trustees, under these presents. And, further, that in case the said Alexander R. Shepherd, his heirs or assigns, shall fail to pay taxes or to keep said property so insured, then the taxes may be paid and the property be insured for the amount aforesaid by the legal holder of the note before mentioned, and the amount of taxes and premium paid shall be considered a part of the expense of said note secured hereby, in default of payment of which the said parties of the second part, or the survivor of them shall have power to sell said property hereby
26 conveyed as aforesaid, and shall dispose of the proceeds of sale, as hereinbefore provided. And it is further agreed that if the property shall be advertised for sale under the provisions of the deed and not sold, then the said trustees shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ALEXANDER R. SHEPHERD. [SEAL.]
MARY G. SHEPHERD. [SEAL.]

Signed, sealed, and delivered in the presence of—
D. B. BELL.

DISTRICT OF COLUMBIA, } ss:
*County of Washington,* }

I, D. B. Bell, a notary public in and for the county aforesaid, do hereby certify that Alexander R. Shepherd and Mary G. Shepherd,

his wife, parties to a certain deed bearing date on the twenty-sixth day of April, A. D. 1875, and hereto annexed, personally appeared before me, in the county aforesaid, the said Alexander R.
27 Shepherd and Mary G. Shepherd being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed. And the said Mary G. Shepherd being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willfully signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal, this twenty-sixth day of April, A. D. 1875.

[SEAL.] D. R. BELL,
*Notary Public.*

And said deed of trust was received and admitted in evidence.

The plaintiff further testified that before the maturity of the notes the defendant sold the house to Gilbert C. Walker, and paid the interest that accrued upon the note up to the time of the sale, and thereafter said Walker paid the interest upon said note to him up to its maturity.

28 That upon the maturity of the note Walker came to him, told him that he (Walker) had to pay the note, and asked that the note be extended for him for one year, and thereupon he extended the note for one year at the same rate of interest; that Walker paid the interest upon the note for the time of the extension, and at its maturity again requested a further extension for one year, but he refused to extend it for a year, but did extend it for nine months at the same rate of interest; that no interest was paid for the last extension, and after the expiration of nine months, default being made in the payment of the note and interest, he caused the trustees under the deed of trust to sell the said real estate at public auction, as required by the deed of trust, and at a sale so made he purchased the property for the sum of $8,500, and after deducting the expenses of sale and taxes, the balance of $—— was credited upon the note, and the balance, $2,684.56, with interest from the day of sale, was due and unpaid; that the property was duly con-
29 veyed to him by Wallach and Duvall, trustees, and he was in possession.

This was all of the evidence given in behalf of the plaintiff, who then rested.

Thereupon the defendant prayed the court to instruct the jury to return a verdict for the defendant, which instruction the court refused to give; and to this refusal the defendant then and there excepted, and prayed the court to sign and seal this his first bill of exceptions, which is accordingly done, this 21st day of Jan'y, 1881, now for then.

A. HAGNER, [SEAL.]
*Ass'e Justice.*

Second. After the evidence had been given set forth in the 1st exception, which is made a part of this exception, the defendant, to maintain the issues on his part joined, offered in evidence the deed from Duvall and Wallach, trustees, to the plaintiff, in words and figures following, to wit:

*Trustees' Deed. Recorded February* 24, 1879—1 *p. m.*

RICHARD WALLACH *et al. to* JOHN FREDERICK MAY.

30 This indenture, made this nineteenth day of February, in the year of our Lord one thousand eight hundred and seventy-nine, between Richard Wallach and Andrew B. Duvall, of the District of Columbia, trustees, of the first part, and John Frederick May, of the second part: Whereas Alexander R. Shepherd and his wife heretofore made and executed a certain deed of trust, bearing date on the twenty-sixth day of April, in the year "eighteen hundred and seventy-five," and thereby conveyed all the hereinafter described real estate, being situate in the city of Washington, in said District of Columbia, unto the said parties of the first part, their heirs and assigns, in trust, to secure the payment of a certain promissory note, and the interest on the same therein fully set forth, and upon any default in the payment thereof to sell the said real estate at public auction, and of the proceeds thereof to pay the said note, interest, and costs of sale, and to convey the said real estate to the purchaser thereof, all of which will fully appear upon reference to the said deed of trust duly recorded in liber No. 781, folio 431, &c., of the land record for the District of Columbia; and

31 whereas, default having been made in the payment of said promissory note and interest, the said parties of the first part, as trustees aforesaid, in the execution of the trust declared in said deed of trust, and by the direction of the party secured thereby, proceeded to make sale of said real estate by public advertisement thereof, and did, on the nineteenth day of February, in the year "eighteen hundred and seventy-nine," at the time and place advertised as aforesaid for the sale thereof, sell the same at public auction to John Frederick May, who, being the highest and best bidder therefor, at or for the sum or consideration hereinafter mentioned, became the purchaser thereof; and whereas the said John Frederick May hath fully complied with the terms of said sale: Now, therefore, this indenture witnesseth that the said parties of the first part, as trustees as aforesaid, for and in consideration of the premises aforesaid, and the sum of eight thousand five hundred dollars in lawful money of the United States, to them in hand paid by the said party of the second part at and before the sealing and delivery of

32 these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, and convey, unto the said party of the second part, his heirs and assigns, all that certain real estate and premises situate and lying in the city of Washington, District of Columbia, and known and described upon the ground plat or plan of said city as all of lot num-

bered seventeen (17), in Babcock's recorded subdivision of original lots eight (8), nine (9), and ten (10), in square numbered one hundred and three (103), together with all the buildings, improvements, way, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the right, title, interest, and estate, legal, equitable, and otherwise, of the said parties of the first part, trustees as aforesaid, of, in, and to the same: To have and to hold the said described real estate and premises and appurtenances unto the said party of the second part, his heirs and
33 assigns, to his and their sole use, benefit, and behoof.

In testimony whereof, the said parties of the first part, as trustees as aforesaid, have hereunto set their hands and seals, on the day and year first hereinbefore written.

RICHARD WALLACH, [SEAL.]
ANDREW B. DUVALL, [SEAL.]
*Trustees.*

Signed, sealed, and delivered in the presence of—
H. CLAY JOHNSON.

DISTRICT OF COLUMBIA, } *sct:*
*County of Washington,* }

I, H. Clay Johnson, a notary public in and for said county, in said District, do hereby certify that Richard Wallach and Andrew B. Duvall, trustees, parties to a certain deed bearing date on the nineteenth day of February, A. D. 1879, and hereto annexed, personally appeared before me in said District, the said Richard Wallach and Andrew B. Duvall being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and seal, this 24th day of February, A. D. 1879.

H. CLAY JOHNSON, [SEAL.]
*Notary Public.*

34 And the defendant prayed the court to instruct the jury that the plaintiff was estopped by his acts in the premises from saying or claiming that the said promissory note was not paid; which instruction the court refused to give, and the defendant then and there excepted to such refusal, and prayed the court to sign and seal this his second bill of exceptions, which is accordingly done this 21st day of January, 1881, now for then.

A. B. HAGNER, [SEAL.]
*Ass'e Justice.*

Third. The defendant thereupon prayed the court to instruct the jury that the plaintiff was estopped by the said conveyance from saying or claiming that the said note was not paid; which instruction the court refused to give, and the defendant then and there excepted to such refusal, and prayed the court to sign and seal this his

third bill of exceptions, which is accordingly done this 21st day of day of January, 1881, now for then.

A. B. HAGNER, [SEAL.]
*Ass'e Justice.*

35 Fourth. The defendant then further offered to prove by William B. Webb, Samuel Cross, and William H. Clagett that the property sold under the deed of trust and purchased by the plaintiff was at the time of sale, and now is, at a fair and reasonable estimate, worth $15,000, which offer the court refused, and to such refusal the defendant then and there excepted, and prayed the court to sign and seal this his fourth bill of exception, which is accordingly done this 21st day of Jan'y, 1881, now for then.

A. B. HAGNER, [SEAL.]
*Ass'e Justice.*

Fifth. The defendant then further offered to prove by Thomas E. Waggaman, the auctioneer, who made the sale, that there was only one bidder at the said sale, and that was the plaintiff, which offer the court refused, and to such refusal the defendant then and there excepted and prayed the court to sign and seal this his fifth bill of exceptions, which is accordingly done this 21st day of Jan'y, 1881, now for then.

A. B. HAGNER, [SEAL.]
*Ass'e Justice.*

36 Sixth. The defendant then further offered in evidence and the same was admitted, the deed of defendant to Gilbert C. Walker, in words and figures following:

*Deed.*

ALEX. R. SHEPHERD *et ux. to* GILBERT C. WALKER.

Recorded August 14, A. D. 1876—9.30 a. m.

This indenture, made this first day of August, in the year of our Lord one thousand eight hundred and seventy-six, between Alexander R. Shepherd and Mary G. Shepherd, his wife, of the city of Washington, in the District of Columbia, of the first part, and Gilbert C. Walker of the city of Richmond, in the State of Virginia, of the second part, witnesseth, that the parties of the first part for and in consideration of the sum of thirty thousand dollars in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and
37 conveyed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns, forever, the following-described real estate, situate in the city of Washington, District of Columbia, to wit: All that certain piece or parcel of ground known and designated upon the ground plats or plan of said city as lot numbered

seventeen (17), in O. E. Babcock's subdivision of original lots numbered eight (8), nine (9), and ten (10), in square numbered one hundred and three (103), as the same is recorded in the office of the surveyor for said city and District, in liber H. D. C., folio 145, subject, however, to a certain deed of trust dated the twenty-sixth day of April, A. D. 1875, and recorded among the land records of the District of Columbia, in liber No. 781, folio 431, *et seq.*, said deed of trust being for the sum of ten thousand dollars, together with all the improvements, ways, easements, rights, privileges, appurtenances,
and hereditaments to the same belonging or in anywise ap-
38 pertaining, and all the remainders, reversions, rents, issues,
and profits thereof, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part, of, in, and to the said piece or parcel of land and premises; to have and to hold the said piece or parcel of land and premises with the appurtenances unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit, and behoof forever; and the said Alexander R. Shepherd, for himself and for his heirs, executors, and administrators, doth hereby covenant, promise, and agree, to and with the said party of the second part, his heirs and assigns, that he, the said party of the first *first* part, and his heirs, shall and will warrant and forever defend the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same or any part thereof, by, from, under, or through him, them, or any of them,
save and accept the aforesaid deed of trust; and further, that
39 he, the said party of the first part, and his heirs, shall and
will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make, execute, deliver, and acknowledge all such other deed or deeds, or other assurances in law for the more certain and effectual conveyance of the said piece or parcel of land and premises and appurtenance unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or his counsel, learned in the law, shall advise, desire, or request.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ALEX. R. SHEPHERD. [SEAL.]
MARY G. SHEPHERD. [SEAL.]

Signed, sealed, and delivered in the presence of—
D. R. BELL.

UNITED STATES OF AMERICA, }
*District of Columbia,* } *ss*:

I, D. R. Bell, a notary public in and for the District afore-
40 said, do hereby certify that Alexander R. Shepherd and Mary
G. Shepherd, his wife, parties to a certain deed bearing date on the first day of August, A. D. 1876, and hereto annexed, per-

sonally appeared before me in the District aforesaid the said Alexander R. Shepherd and Mary G. Shepherd, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledge the same to be their act and deed; and the said Mary G. Shepherd being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal, this third day of August, A. D. 1876.

[SEAL.]

D. R. BELL,
*Notary Public.*

The defendant offered no other evidence.

The court then instructed the jury that the evidence in behalf of the defendant, though believed by the jury, was not legally
41 competent to defeat the plaintiff's right to recover, to which instruction the defendant then and there excepted, and prayed the court to sign and seal this his sixth bill of exceptions, which is accordingly done, this 21st day of Jan'y, 1882, now for then.

A. B. HAGNER, [SEAL.]
*Asso. Justice.*

The jury then returned a verdict for the plaintiff for $1,363.28 and costs.

3143.28

*Motion for New Trial on Bills of Exceptions* *Filed January 21st*, 1881.

In the Supreme Court of the District of Columbia.

MAY
*vs.*
SHEPHERD. } At Law. No. 20820.

And now comes the defendant and moves the court for a new trial upon bills of exceptions, signed and sealed by the court now for then.

WM. F. MATTINGLY,
A. C. BRADLEY,
*Att'ys for Defendant.*

42 Proceedings before the supreme court of the District of Columbia, beginning on the fourth Monday of January, 1882, in pursuance of the order of the court of the 19th of December, 1881, *ante.*, page 199.

TUESDAY, *March* 21, 1882.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices Cox and James.

JOHN FREDERICK MAY
*vs.*
ALEXANDER R. SHEPHERD. } At Law. No. 20820. Cal. 22.

A. C. Bradley, for the defendant, and in support of the defendant's motion for a new trial upon exceptions to the rulings of the court in special term, states the case.

FRIDAY, *March* 24, 1882.

Session resumed pursuant to adjournment.
Present: Chief Justice Cartter and Justices Cox and James.

JOHN FREDERICK MAY
*vs.*
ALEXANDER R. SHEPHELD. } At Law. No. 20820. Cal. 22.

43 Argued by Mr. Duvall for the plaintiff, and by Mr. Mattingly for the defendant. Submitted.

MONDAY, *April* 3, 1882.

Session resumed pursuant to sdjournment.
Present: Chief Justice Cartter and Justices Cox and James.

JOHN FREDERICK MAY, Pl'ff,
*vs.*
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 20820. Cal. 22.

Now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it appears to the court here that there is no error, either in the record and proceedings or in the judgment of the special term, therefore, it is considered that the said judgment be, and the same is hereby, affirmed with costs, the defendant's motion for a new trial upon exceptions notwithstanding. (Chief justice dissenting.)

44 In the Supreme Court of the District of Columbia, the — day of —, 18—.

JOHN F. MAY
*vs.*
ALEXANDER R. SHEPHARD. } At Law. No. 20820. In Error.

Know all men by these presents, that we, Alexander R. Shepherd and Joseph T. Stevens, are bound unto the above-named John F. May in the sum of two hundred and fifty dollars, to be paid to the said John F. May, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 20th day of September, 1882.

Whereas the above-named Alexander R. Shepherd has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Alexander R. Shepherd shall prosecute his said writ to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ALEXANDER R. SHEPHERD, [SEAL.]
By WM. F. MATTINGLY &
A. C. BRADLEY,
*His Attorneys-in-Fact.*
JOSEPH T. STEVENS. [SEAL.]

Sealed and delivered in presence of—

_____ _____.

Approved this 21st day of Sept., 1882.

D. K. CARTTER,
*Ch'f Justice.*

45 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you between John Frederick May as plaintiff and Alexander R. Shepherd as defendant, at law, No. 20820, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 21st day of September, in the year of our Lord 1882, and of the Independence of the United States the 107.

[SEAL.] R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John Frederick May:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Alexander R. Shepherd is plaintiff in error and

you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Jus.*

Service accepted.

ANDREW B. DUVALL,
*For Def't in Error.*

Sept. 28th, 1882.

46 AUTHENTICATION OF RECORD.

*Clerk's Certificate.*

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 28th day of September, 1882.

[SEAL.]

R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
*Assistant Clerk.*

*Justice's Certificate.*

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 28th day of September, 1882.

D. K. CARTTER, [SEAL.]
*Chief Justice.*

*Clerk's Certificate to Justice's Official Character.*

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 28th day of September, 1882.

[SEAL.]

R. J. MEIGS, *Clerk,*
By J. JAY CAMP,
*Assistant Clerk.*

Endorsed on cover: Dist. Columbia supreme court. No. 315. Alexander R. Shepherd, plaintiff in error, *vs.* John Frederick May. Filed 7th October, 1882.

115-665

SUPREME COURT U.S.
WASHINGTON, D.C.
NOV 2 1885
JAMES H. McKENNEY
CLERK

# Supreme Court of the United States.

**OCTOBER TERM, 1885.**

*No. 50.*

ALEXANDER R. SHEPHERD, PLAINTIFF IN ERROR,

*vs.*

JOHN FREDERICK MAY.

## BRIEF FOR PLAINTIFF IN ERROR.

WM. F. MATTINGLY,
A. C. BRADLEY,
*Counsel for Plaintiff in Error.*

JUDD & DETWEILER, PRINTERS.

# Supreme Court of the United States.

**OCTOBER TERM, 1885.**

*No. 50.*

ALEXANDER R. SHEPHERD, PLAINTIFF IN ERROR,

*vs.*

JOHN FREDERICK MAY.

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT.

On the 26th day of April, 1875, the plaintiff in error was the owner of lot No. 17, in Babcock's subdivision of part of square No. 103, in the city of Washington, D. C., improved by a three story and mansard roof brick dwelling, twenty-seven feet six inches front, with a three-story back building, and containing seventeen rooms, the lot being one hundred and twenty feet deep. On that day, the defendant in error, regarding the property as good security for a loan of $10,000, lent the plaintiff in error that amount, and took from him his promissory note payable two years after date, with interest at ten per centum per annum, payable quarter yearly until paid, and, to secure the payment of said note, took from the plaintiff in error a deed of trust, in which the note is fully described, by which the real estate mentioned was conveyed to trustees, with power to sell in default of the payment of said note or interest, according to its terms. Before

the maturity of the note, the plaintiff in error sold the property to Gilbert C. Walker, and conveyed to him by deed dated August 1, 1876, subject to the deed of trust above mentioned, which trust is also excepted from the covenant of warranty, and paid the interest to the defendant in error as it accrued, up to the time of the sale; and thereafter Walker paid to the defendant in error the interest as it accrued to the maturity of the note. Upon the maturity of the note Walker went to the defendant in error, told him that he, Walker, had to pay it, and asked him to extend the note for him (Walker) for one year, and thereupon he extended the note for one year at the same rate of interest. Walker paid the interest, during the period of extension, at the rate specified in the note, "ten per centum per annum, payable quarter yearly, until paid," the several payments being $250 each. On July 25th, 1877, he paid the interest for the quarter ending July 26, 1877. On October 23, 1877, he paid the interest for the quarter ending October 26, 1877; for the quarter ending January 26, 1878, he paid the interest February 9th, 1878, and for the quarter ending April 26th, 1878, the maturity of the extension, he paid the interest April 23d, 1878. Upon the maturity of the extension Walker requested a further extension of one year, but the defendant further extended it only for nine months, at the same rate of interest.

The plaintiff in error did not consent to these extensions; he had no knowledge of them, and no rights were reserved against him.

After the maturity of the last extension, default being made in the payment of the debt and interest, the property was advertised and sold by the trustees under the deed of trust for the sum of $8,500, and at this sale the defendant in error became the purchaser, received a deed, and entered into possession. After crediting upon the note the net proceeds of sale the defendant in error sued the plaintiff in error to recover the deficiency, and at the trial, December 1st, 1880, recovered a judgment for $3,163.28 and costs.

## Assignment of Errors.

1. The court erred in refusing to instruct the jury to return a verdict for the (defendant) plaintiff in error, as shown in the first bill of exceptions.

2. The court erred in refusing to instruct the jury that the (plaintiff) defendant in error was estopped by his acts in the premises from saying or claiming that the promissory note was not paid, as shown in the second bill of exceptions.

3. The court erred in refusing to instruct the jury that the (plaintiff) defendant in error was estopped by the deed to him from saying or claiming that the promissory note was not paid, as shown in the third bill of exceptions.

4. The court erred in refusing to admit the evidence that the property sold under the deed of trust was reasonably worth $15,000 at the time of the sale, as offered in the fourth bill of exceptions.

5. The court erred in instructing the jury, as shown in the sixth bill of exceptions, that the evidence in behalf of the (defendant) plaintiff in error, though believed by the jury, was not legally competent to defeat the right of the (plaintiff) defendant in error to recover.

6. The court erred in holding that the contract between May and Walker for the extension of time was usurious and void, and therefore, not binding on May.

## Brief.

Walker having purchased the property from Shepherd subject to the indebtedness secured thereon, which he agreed to pay, May, with full knowledge of these facts, acquiesced in the arrangement, and agreed with Walker to extend the time of payment of the note, first, for one year, and then for nine months, at the same rate of interest, ten per cent.

We claim that under these circumstances Walker became the principal debtor, and Shepherd the surety for the payment of the note, and that the extension for a definite time, for a valid consideration, without Shepherd's consent, released him from all liability on the note.

Jones' M'tg., 740, 741, 742.
Millerd *vs.* Thorn, 56 N. Y., 406.
Colgrove *vs.* Tallman, 67 N. Y., 96.
Oakley *vs.* Pashlee, 10 Bligh., N. P. R., 548, 80, 81.
Metz *vs.* Todd, 36 Mich., 473.
Calvo *vs.* Davies, 73 N. Y., 211.
George *vs.* Andrews, 60 Md., 26.

Formal words need not be used to show that the purchaser of mortgaged premises assumed the payment of the mortgage. The assumption may be established by circumstances, and a parole or verbal promise is sufficient.

Jones' M't'g., 760, 761, 762.
Moore's Appeal, 88 Pa., 450.
Bolles *vs.* Beach, 2 Zab., 680.
Drury *vs.* Tremont Imp. Co., 13 Allen, 168.
Brewer *vs.* Dyer, 7 Cush., 337.

In this case, under his assumed relations to the debt, Walker became liable upon it to suit at law by May.

Jones' M'tg., 758.
Brewer *vs.* Dyer, *supra.*
Barker *vs.* Bucklin, 2 Den., 45.
Lawrence *vs.* Fox, 20 N. Y., 268.
Buir *vs.* Beers, 24 N. Y., 178.
Ross *vs.* Kennison, 38 Iowa, 396.
Krumbaugh *vs.* Kugler, 3 Ohio St., 549.
Thompson *vs.* Thompson, 4 Ohio St., 333, 54.

Walker, a stranger to the note, thus becoming liable to

May for its payment, this of itself was a new consideration to May, and a good consideration for the extension.

Boyd *vs.* Freize, 5 Gray, 553.

The note bore ten per cent. interest until paid, and its extension, at the same rate of interest, for Walker, was for a sufficient consideration and binding.

German Savings Ass'n *vs.* Helmrick, 57 Mo., 101.
Stillwell *vs.* Aaron, 69 Mo., 539.
McComb *vs.* Kittredge, 14 Ohio, 348.
Wood *vs.* Newkirk, 15 Ohio St., 298.
Fawcett *vs.* Freshwater, 31 Ohio St., 637.
Fay *vs.* Tower, 50 Wis., '83, 392.
Dodson *vs.* Henderson, Ill., 1885, reported in Chicago Legal News, vol. 17, p. 277.

Our usury law is contained in sections Nos. 713, 714, 715, 716, Revised Statutes United States for District of Columbia, and is as follows:

§ 713. "The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as provided in this chapter."

§ 714. "In all contracts made it shall be lawful for the parties to stipulate or agree in writing that the rate of ten per centum per annum, or any less sum, of interest shall be taken and paid upon every one hundred dollars of money loaned, or in any manner due and owing from any person or corporation in the District."

§ 715. "If any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract in writing or six per cent. upon any verbal contract, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."

§ 716. "If any person or corporation within the District shall directly or indirectly take or receive any greater amount of interest than is provided for in this chapter, upon any contract or agreement whatever, it shall be lawful for the person, or his personal representative, or the corporation paying the same, to sue for and recover all the interest paid upon any such contract or agreement from the person or his personal representative, or from the corporation receiving such unlawful interest; but the suit to recover back such interest shall be brought within one year after such unlawful interest shall have been paid or taken."

The contract for the extension in this case was not for a usurious consideration because, first, the note which Walker had become liable to pay, bore ten per cent. interest on its face *until paid*, and his agreement was simply that this existing legal contract should continue in force; second, it is impossible to conceive how, under any construction of this law, this contract could be held to have been usurious when it was lawful and proper for May to accept the rate of interest which the contract called for, and which under the law he did not forfeit, and which Walker could not recover by suit.

But even if the contract could be held to have been usurious, the record shows that the interest was payable quarter yearly, and that for the quarter ending July 26, 1877, the interest was paid July 25, 1877; for the quarter ending October 26, 1877, the interest was paid October 23, 1877, and for the quarter ending April 26, 1878, the interest was paid April 23, 1878. In each of these instances the interest was paid in advance. In the first one day, and in the second and third, three days. Such payments implied, and were each a sufficient consideration for a promise to forbear for the respective periods for which the interest was paid, and each of such extensions was sufficient to discharge the surety, Shepherd.

Oates *vs.* Bank, 100 U. S., 248.

Wild *vs.* Howe, 74 Mo., 551.

The authorities are uniform upon this question.

For each quarter of the first extension of one year the entire interest specified in the note and agreed to be paid by Walker, in consideration of the extension, was paid. The contract if usurious was not void, it was voidable at the option of the debtor, and not at the option of the creditor. Such payment discharged the surety.

Lemmon *vs.* Whitman, 75 Ind., 318, and cases cited therein.

The plaintiff claims a balance due on the note after crediting what he says were the net proceeds of sale under the deed of trust of the property of which he became the purchaser, and obtained a deed which recites that the property was sold in accordance with the terms prescribed by the deed of trust, and that he became the purchaser at such sale, and has fully complied with the terms of sale. The deed of trust prescribed that the terms of sale shall be the amount of the note and expenses of sale in cash, and the plaintiff is estopped to say that the note is not paid.

Fitch *vs.* Borden, 17 Johns, 161, 166.
Freeman *vs.* Auld, 44 N. Y., 50.
Dundas *vs.* Hitchcock, 12 How., 256.
Henry Co. *vs.* Winnebago Drain Co., 52 Lees, 454.

A party cannot occupy inconsistent positions, and where one has an election between inconsistent courses of action he will be confined to that which he first adopts. Any decisive act of the party done with knowledge determines his election and works an estoppel. The plaintiff can't hold that property and say that the note is not paid.

Bigelow, Estop., 503, 504, &c.
Bruding *vs.* Stamper, 18 B. Mon., 175.
Phillips *vs.* Rogers, 12 Met., 405.
Horton *vs.* Davis, 26 N. Y., 495.

The 4th and 5th exceptions show that the property was

worth more than sufficient to pay the debt, and that the plaintiff brought it in at such bid as he saw fit to make, and in view of the terms of the deed of trust the evidence was admissible to show payment of the debt by the sale.

WM. F. MATTINGLY,
A. C. BRADLEY,
*Counsel for Plaintiff in Error.*

SHEPHERD *vs.* MAY.—*October Term*, 1885.—*No.* 50.

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It is competent to show by parol testimony the true relations that parties to commercial paper bear to the debt evidenced by it; that one who signs as maker is in fact a surety, and the holder of the note, with notice of this relation, is bound to act accordingly.

Harris *vs.* Brooks, 21 Pick., 195.
Guild *vs.* Butler, 127 Mass., 386.
Wheat *vs.* Kendall, 6 N. H., 504.
Hubbard *vs.* Gurney, 64 N. Y., 460.
Lime Bank *vs.* Mallett, 34 Me., 547.

# Supreme Court of the United States.

October Term, 1885.—No. 50.

ALEXANDER R. SHEPHERD, *Plaintiff in Error,*

*vs.*

JOHN FREDERICK MAY, *Defendant in Error.*

## Brief for Defendant in Error.

This is an action at law by the payee of a note against the maker. The note was secured by deed of trust on real estate; the real estate was sold to plaintiff at public auction by the trustees, under the trust, the proceeds of sale were credited upon the note; this suit was brought and judgment was recovered for the balance.

The so-called extensions of the note were made after its maturity; it does not appear that they were made without Shepherd's knowledge or consent.

Before the maturity of the note, the defendant sold and conveyed said real estate, "subject to said deed of trust," to G. C. Walker, who did not, in the deed to him, in any manner, assume or agree to pay the note or the deed of trust, nor was its amount deducted from the purchase money or retained by him.

Walker simply thereby purchased the equity of redemption; he incurred no personal liability whatever to

Shepherd or May in respect to the deed of trust or note. It is claimed by appellant that Walker agreed with Shepherd to pay this note, because the conveyance is made "subject to" the deed of trust, which is also excepted from the covenant of warranty. Of course, Walker "had to pay it," as he informed May, (Rec. p. 11), if he desired to hold the property, but not otherwise, for he was not bound to Shepherd to pay it.

An agreement made to take land, subject to a specified incumbrance, is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee.

*Elliott* vs. *Sackett*, 108 U. S., 140.

Known incumbrances, subject to which the purchaser agrees to take the property, should, for the vendor's protection, be specially and expressly excepted from the covenant against incumbrance, as otherwise the fact of their being known to the purchaser will, according to the weight of authority, be no bar to his recovery upon it.

Whenever the contract is that the purchaser takes the land *cum onere*, the incumbrance should be expressly excepted in the deed from the operation of the covenant, in which case, of course, the covenantor will not be liable.

Rawle Covenants for Title (2d Edit'n), 149.

Where land is conveyed in terms subject to a mortgage, the grantee does not undertake or become bound by the mere acceptance of the deed to pay the mortgage debt.

He is, indeed, interested in its payment, because it is an incumbrance on the land of which he is the owner; but he has entered into no obligation, express or implied, to pay it, and if he parts with his title he no longer has any interest in its payment. The words were "subject, however, to a mortgage * * * of $7,000, which is part of the above named consideration." They show that the grantee had purchased only an equity of redemption.

*Fiske* vs. *Tolman*, 124 Mass., 256.

By accepting deed of land with full covenants reciting consideration of $12,000, with *habendum* "subject to four mortgages (described) amounting to $8,500, which has been estimated as part of the consideration and deducted therefrom," the grantee assumes no personal liability for the payment of the mortgages.

If the language had stopped with declaring the subjection of the land to the lien of the mortgages, it would have been the ordinary case of the purchase of a mere equity of redemption. According to all the cases, the land would have been the primary fund for the payment of the mortgages, yet without any other liability on the part of the grantee. But the other words import nothing additional or different. * * The apparent meaning is, that so much of the purchase money as the mortgages amount to, being deducted, is not to be paid, except as it is charged upon the premises.

*Belmont* vs. *Coman*, 22 N. Y., 438.

Where party receives warranty deed, containing a clause that it is made subject to a mortgage given upon the land by the grantor, this will create no personal liability on the part of the grantee to pay the outstanding incumbrance, unless he has specially agreed to do so, or the amount of the incumbrance has been deducted from the purchase price. The effect of such clause is to make the land the

primary fund as between all the parties for the payment of the debt.

*Fowler* vs. *Fay*, 42 Ill., 375.

*Vide* also same principle.

*Comstock* vs. *Hitt*, 37 Ill., 546;

*Hoy* vs. *Bramhall*, 4 C. E. Gr., 78.

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Whatever may have been the relations established between Shepherd and Walker by this sale and purchase of the equity of redemption in said real estate, we maintain defendant's relation to plaintiff, upon the note, remained unchanged; there was no novation; appellant was and continued to be the maker of the note; his liability as such was ever fixed and determined; he did not, as he claims, become Walker's surety on the note.

For even had Walker, when he bought, put his name on the note, he would have been a guarantor (*Rey* vs. *Simpson*, 22 How., 341); Shepherd would have still remained maker.

Where a party does not appear upon the instrument as surety, he cannot, at law, avail himself of the equities between himself and the other parties to the instrument, unless he be accepted by the creditor as surety or has been discharged from the first contract by agreement of the creditor.

*Yates* vs. *Donaldson*, 5 Md., 389–401.

No attempt has been made to show any agreement that he should be treated and considered as surety only, contrary to the express terms of his contract to be bound as principal.

*Spriyg* vs. *Bank*, 10 Pet, 266; 14 Pet., 206.

No contract different from the note could be shown.

*Bank* vs. *Dunn*, 6 Pet., 51.

In equity, as between appellant and Walker, if the latter had assumed the deed of trust in the deed or covenanted therein to pay the same ,especially if the amount was deducted from the price, it may be that appellant became his surety, but not as between appellee and appellant.

1 Hilliard Mortgages, 327, and cases;

*Waters* vs. *Hubbard*, 44 Conn., 340–348.

Where the purchaser of mortgaged premises assumes in the deed, or covenants to pay the mortgage debt, he is liable for the amount of it to the grantor, and as between them the mortgagor becomes a surety and the vendee makes the debt his own. The relation of the vendor and mortgagor to the mortgagee remains unchanged, and both the vendor and purchaser, may, as to him, be treated as principals, and this relation will not be changed by an agreement between the vendee and mortgagee for an extension of time.

*Corbet* vs. *Waterman*, 11 Iowa, 86.

By his covenants to pay the amount of the mortgage as part of the purchase money, the vendee made the debt his own as between himself and his vendors. But as they still stood bound to the mortgagee the relation of principal and surety was established immediately on the execution of the conveyance, though each continued liable to the mortgagee as principal debtors. Their positions may be illustrated by the case of one partner undertaking to pay the debts of a dissolved partnership. Such debts are regarded in equity, between the partners, as debts of the undertaking party

*Morris* vs. *Oakford*, 9 Barr, 499.

The purchaser of property from the mortgagor or grantor in a trust deed, after the mortgage or deed of trust is re-

corded, who assumes no liability to the mortgagor which the latter can enforce, is in no sense the surety of his vendor the original debtor. The extension of the time of payment to a debtor by mortgage, while he holds the equity of redemption, does not release or discharge the lien of the mortgage, nor will such extension release the lien in favor of an assignee of the equity of redemption.

*Maher* vs. *Lanfrom*, 86 Ill., 513.

Where one of two joint makers of a note and mortgage given to secure it, sells his interest in the mortgaged premises to the other, the latter assuming by the terms of the purchase the payment of the mortgage, this does not constitute the maker thus transferring his interest a surety as to the mortgagee, nor change his liability to him, although as between themselves the mortgagors sustain such relation. That plaintiff had released a portion of the mortgaged premises would not affect his right of recovery against the one who had sold his interest in the land as above stated.

*James* vs. *Day*, 37 Iowa, 164.

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The cases cited by appellant (brief, top p. 4) are easily distinguishable from the case at bar.

*George* vs. *Andrews*, 60 Md., 26, was a bill for injunction to stay proceedings at law for a deficiency on mortgage debt. The purchaser of the equity of redemption assumed and agreed to pay the mortgage debt. An express covenant to that effect was made.

*Calvo* vs. *Davies*, 73 N. Y., 211, was a bill to foreclose mortgage; the purchaser of the land took the conveyance subject to the mortgage, and in and by the conveyance assumed and agreed to pay the same.

The other cases relate to partnership debts where all the partners are liable to the creditor. In the cases cited one

of the partners expressly assumes and agrees to pay the debts, and he releases his copartners from their obligation. Two essential elements exist there which are wanting here, viz: original liability to the creditor, and an express agreement between the debtors by which one assumes and agrees to pay the debt.

But no indulgence, short of an agreement, express or implied, to take him as the debtor, and to discharge the other partner, can place them in the situation of principal and surety, so as to discharge the retiring partner.

*Harris* vs. *Lindsay*, 4 Wash. C. C., 620.

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If Walker in the conveyance to him had assumed the note and agreed to pay it, he would not have been liable upon it to suit at law by appellee as claimed in appellant's brief; it is not enough that he would be incidentally benefited by the performance of the contract; it must be primarily for his benefit; its object must have been to confer a benefit on him.

But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation) he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required.

*Nat'l Bank* vs. *Grand Lodge*, 98 U. S., 124.

On a promise made to the vendor by the purchaser of an equity of redemption to assume and pay as part of the consideration, named in the deed, the mortgage on the land, no

action lies by the mortgagee. The defendant, by accepting the deed, made a contract with his grantor to pay the amount of the mortgages upon the land granted; but the grantor transferred no money or fund to the defendant; and the defendant made no contract with the mortgagees or their assigns upon which an action at law will lie.

*Prentice* vs. *Brimhall*, 123 Mass., 291–293.

In the ordinary case of purchase of an equity of redemption from a mortgagor, with a provision in the deed that the grantee assumes and agrees to pay the mortgage debt, no right of action on the promise accrues to the mortgagee. To give the mortgagee the right of action, the promise must have been intended for his benefit; it is not enough that a benefit may accrue to him.

*Meech* vs. *Ensign*, 49 Conn., 191–207.

A covenant by a grantee of mortgaged premises to assume and pay the mortgage debt contained in his deed of conveyance, is a contract with his grantor, only for the indemnity of the latter, and may be released and discharged by him.

*Youngs* vs. *Trustees, &c.*, 31 N. J., Eq., 290–299.

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There is no pretence that Walker was insolvent; and if he had assumed payment of the note, and was, as between them, primarily liable, appellant could have enforced that contract without actual payment by himself.

1 Story, Eq. Juris., p. 327;
*Rawson* vs. *Copeland*, 2 Sandf., 284.

Action for breach of covenant. Defendant accepted deed from plaintiff, "subject to mortgages amounting to $6,500, which the grantee hereby assumes and agrees to pay." This was a contract not merely to indemnify the grantor, but to

pay the debt, if it be the debt of the grantor; action may be maintained even where it has not been paid by the promisee and the amount of the debt recovered as damages.

*Furnas* vs. *Durgin*, 119 Mass, 506;
*Vide* also, *Williams* vs. *Fowle*, 132 Mass., 385;
*Sharkman* vs. *Gove*, 44 N. J., Law, 252; and cases cited.
*Stout* vs. *Folger*, 38 Iowa, 71

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Appellant could have discharged his obligation at any time after maturity of the note by payment; the so-called extension of the note was *nudum pactum*.

Assuming that appellant in this case was surety for the payment of his own debt, yet the extension was made after the maturity of the note; and this does not discharge the surety.

*Hayes* vs. *Wells*, 34 Md., 515.

An agreement to extend time of payment for definite period at the same rate of interest the debt would otherwise bear for that period, does not discharge the surety, because it creates no additional obligation.

*Reynolds* vs. *Ward*, 5 Wend., 501.

Payments of usurious interest in advance are insufficient; such payments were voluntary payments which Walker was not bound to make for a voluntary indulgence which appellee might have withheld. Is not the creditor permitted to show that the agreement is one he could not enforce, and one which must therefore be void for mutuality? The interest may, under the statute, be recovered by the party who paid it.

*Green* vs. *Lake*, 2 Mackey, 162, 179, 181–3.
*Shaw* vs. *Burkard*, 10 Ind'a, 227.

In *Oates* vs. *Bank*, (100 U. S., 239), cited by appellant, both the extension of time and payment of usury were, before the maturity of note. *Vide* p. 247.

Part payment of the amount due, whether by principal, or surety, will not discharge the surety.

*Oberndorff* vs. *Bank*, 31 Md., 126;
*Matthewson* vs. *Bank*, 45 N. H., 104.

Payment of usury, after maturity of note, is a payment on account which the debtor is under obligation to make, and therefore is no advantage to one or disadvantage to the other, so as to create consideration for extension which may discharge surety on the note.

*Hartman* vs. *Danner*, 74 Pa. St., 36;
*Shaffer* vs. *Clark*, 90 Idem., 98.

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The extension of time must be shown to have been without knowledge or consent of the surety; it is matter of defence, and must be pleaded or proven: *non constat*, in this case, but it was with appellant's knowledge and consent. It is not to be presumed that the intention was to discharge the surety.

*Butler* vs. *Hamilton*, 2 Desauss, 231;
*Barker* vs. *McClure*, 2 Blackf., 14;
*Freeman's Bank* vs. *Rollins*, 13 Me., 207.

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The 3d, 4th, 5th and 6th bills of exception (Rec. 13–16), cannot be assigned for error; they are mere independent, abstract propositions, not sufficiently referring to any proceedings at the trial.

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It was not competent in this case for appellant to litigate any question as to the manner or sufficiency of the

sale made under the deed of trust by the trustees. Any such alleged breaches of trust were only cognizable upon a direct issue with them in a court of chancery. The court below, therefore, properly refused to entertain testimony relative to the value of the security, the adequacy of the price obtained, or the number of bidders at the sale made by the trustees.

Hill on Trustees, 518–521;
*Shields* vs. *Barrow*, 17 How., 130–139.

The note and the deed of trust are for many purposes distinct. Different remedies are administered in different tribunals for each; different parties are convened. The note may be barred, and yet the trust enforced; the trust may be void, and yet the note valid; the note may be in judgment, and that barred by limitations, and still it would not extinguish the collateral remedy under the deed of trust, though it had relation to and was intended to secure payment of the same note.

*Bank of Metropolis* vs. *Guttschlick*, 14 Pet., 19–32;
Vide *Ober* vs. *Gallager*, 93 U. S., 199.

The deed of trust executed by Shepherd was the customary collateral security for the repayment of money loaned. It was intended as such, and as such it is pleaded by appellant. There is no foundation for the claim now made by him, that he was to be absolutely absolved from any further accountability on the note in the event of a sale under the deed of trust. The terms of sale prescribed in the deed (upon which appellant claims the estoppel) are the mere incidents of the power lodged in the trustees; the power to sell for cash was inserted solely to prevent any delay in realizing the money upon default in payment of the note.

*Markey* vs. *Langley*, U. S., 142;
Alexander's Chancery, 145, 146;
*Hubbard* vs. *Jarrell*, 23 Md., 75.

The operation of deeds is a question of intention; the doctrine of estoppel is never carried further than the parties appear from the tenor of the whole instrument to have agreed. The presumption is against rather than in favor of estoppel, and the party relying upon it must show that it results from the particular clause, and is consistent with the tenor and object of the deed.

If the construction contended for was correct, then, in case of the depreciation of the property, the creditor would have to take it in full satisfaction of the trust, or surrender his debt altogether. The true construction of the provision in question, the court below held, is: that the trustees should require a cash payment of enough to satisfy the debt, if the purchase money were sufficient for that purpose, and the balance in two instalments. Undoubtedly the trustees so regarded it, and May's contract was according to that understanding.

*May* vs. *Shepherd*, 1 Mackey, 430–443.

It is respectfully submitted there was no error, and the judgment should be affirmed.

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